CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

WEST SEATTLE DEFENSE FUND, Petitioner, v. CITY OF SEATTLE, Respondent.	))))))))))	**Case No. 94-3-0016** **ORDER GRANTING SEATTLE'S MOTION TO DISMISS SEPA CLAIM** **[Legal Issue No. 10]**

On October 7, 1994, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the West Seattle Defense Fund (**WSDF**) challenging the City of Seattle's (the **City** or **Seattle**) Comprehensive Plan (the **Plan**) for not complying with the Growth Management Act (**GMA**) and State Environmental Policy Act (**SEPA**).

On November 16, 1994, the Board entered a Prehearing Order that, among other matters, specified eleven legal issues to be determined by the Board and established a schedule for filing motions and prehearing briefs and responses and replies to those documents.

On November 23, 1994, the City of Seattle's Motion to Dismiss SEPA Claim (**Seattle's Motion to Dismiss**) was filed with the Board. It asked the Board to dismiss Legal Issue No. 10 as set forth in the Prehearing Order. Eleven exhibits were attached to Seattle's Motion to Dismiss.

On December 5, 1994, WSDF's Response to Motion to Dismiss SEPA Claim (**WSDF's Response**) was filed with the Board. A Declaration of Bob C. Sterbank in Support of WSDF's Response to Motion to Dismiss SEPA Claim (**Sterbank Declaration**) was attached to WSDF's Response. The Sterbank Declaration included three exhibits and several attachments to those exhibits. A Declaration of Charles Chong in Support of WSDF's Response to Motion to Dismiss SEPA Claim (**Chong Declaration**) was also attached to WSDF's Response. Four exhibits were attached to the Chong Declaration. The Declaration of Robert Schmidt in Support of WSDF's Response to Motion to Dismiss SEPA Claim (**Schmidt Declaration**) was also filed with WSDF's Response. A fourth declaration, the Declaration of Gary Moseley in Support of WSDF's Response to Motion to Dismiss SEPA Claim (**Moseley Declaration**), with one exhibit attached, was also filed.

On December 12, 1994, the City of Seattle's Reply Brief on Motion to Dismiss SEPA Claim (**Seattle's Reply**) was filed with the Board. One exhibit, a cassette tape identified as Exhibit 12, and the Declaration of Robert D. Tobin were attached.

The Board held a hearing on Seattle's Motion to Dismiss at 10:00 a.m. on Tuesday, December 13, 1994 at 1225 One Union Square, Seattle. The Board's three members were present: M. Peter Philley, presiding, Joseph W. Tovar and Chris Smith Towne. Peter J. Eglick and Bob C. Sterbank represented WSDF, and Robert D. Tobin represented Seattle. Court reporting services were provided by Duane W. Lodell, CSR of Robert H. Lewis & Associates, Tacoma. No witnesses testified.

Following the hearing, the parties were given the opportunity to submit additional briefs on whether the Board's decision in *Friends of the Law v. King County* (***FOTL II***), CPSGMHB Case No. 94-3-0009, applied to this case. Subsequently, the Supplemental Brief of WSDF Regarding City of Seattle's Motion to Dismiss SEPA Claim and the City of Seattle's Supplemental Brief on City's Motion to Dismiss SEPA Issue were filed on December 19, 1994. Both parties contend that the *FOTL II* decision is inapplicable because it does not involve exhaustion of administrative remedies and it was a GMA appearance standing case rather than one involving SEPA standing.

I. FINDINGS OF FACT

1. In December, 1993 - January, 1994, the Neighborhood Rights Campaign (**NRC**), a coalition of West Seattle citizens, was organized "to help preserve West Seattle and its neighborhoods against the vast remapping and replanning contemplated for it by the [yet to be adopted] Seattle Comprehensive Plan." Chong Declaration to WSDF's Response, at 1.

2. The acting chair of the NRC is Charles Chong. Chong Declaration to WSDF's Response, at 1,¶ 2.

3. In March, 1994, the Mayor's Proposed Comprehensive Plan, approximately 800 pages long, became available to the public. WSDF's Petition for Review, at 6, ¶ 3.8; City's Preliminary Exhibit List, at 6, Exhibit 1.27.

4. On March 3, 1994, the Final Environmental Impact Statement (**FEIS**) on the Mayor's Proposed Comprehensive Plan was released. City's Preliminary Exhibit List, at 6, Exhibit 1.28; WSDF's Response, at 15.

5. On March 25, 1994, the Seattle Community Council Federation (**SCCF**) filed an appeal of the adequacy of the FEIS on the Mayor's Proposed Comprehensive Plan. Exhibit 1 to City's Motion to Dismiss. The Board is aware of only SCCF's appeal to the Hearing Examiner; nothing in the record indicates that other persons appealed the FEIS below.

6. The SCCF is a federation of member community groups. Its board of directors is comprised of representatives of all member groups and takes actions on behalf of all member groups. The designated contact person for the SCCF's appeal to the Hearing Examiner was Anna Nissen. Exhibit A to Sterbank Declaration to WSDF's Response.

7. Two of SCCF's member organizations are the Friends of Lincoln Park (**FLiP**) and the Highland Park Action Committee (**HPAC**). The chair of FLiP is Gary Moseley; Bobby Schmidt chairs the HPAC. Exhibit A to Sterbank Declaration. Both Moseley and Schmidt were aware that SCCF challenged the FEIS on behalf of FLiP and HPAC and the other member organizations of SCCF. Moseley Declaration to WSDF's Response, at 1, ¶ 3; and Schmidt Declaration to WSDF's Response, at 1, ¶ 3.

8. On April 20, 1994, the City's Hearing Examiner granted motions by the City (*see* Exhibits 2 and 5 to Seattle's Motion to Dismiss) and issued an Order dismissing SCCF's appeal because:

> The appellant has not presented cognizable bases for this appeal. As an appeal to the adequacy of the EIS, the appeal is without merit and should be, and hereby is DISMISSED. Exhibit 7 to Seattle's Motion to Dismiss.

9. On April 28, 1994, the City's Hearing Examiner issued an Order denying SCCF's Motion to Reconsider the Order [of Dismissal]. Exhibit 10 to Seattle's Motion to Dismiss.

10. The Seattle Municipal Code does not contain an appeals procedure beyond a hearing examiner's final decision.

11. SCCF could have appealed the Hearing Examiner's April 28, 1994 decision to this Board had it elected to appeal the City's adoption of its comprehensive plan. It did not. Seattle's Motion to Dismiss, at 3.

12. On July 25, 1994, the City of Seattle adopted its comprehensive plan, as required by the GMA. WSDF's Petition for Review, at 1, ¶ 2.

13. On August 9, 1994, the City published notice of adoption of its comprehensive plan pursuant to RCW 36.70A.290(2). WSDF's Petition for Review, at 1, ¶ 2.

14. The NRC organized opposition to the City's Comprehensive Plan (Moseley Declaration, at 2 and Schmidt Declaration, at 2) and ultimately decided to appeal the Seattle Comprehensive Plan to this Board under the auspices of the WSDF. Chong Declaration to WSDF's Response, at 2, ¶ 3 and 5.

15. A September 30, 1994 letter explains the creation of the WSDF. Exhibit B to Chong Declaration. The WSDF is a Washington non-profit corporation of property owners and residents in the West Seattle area. WSDF's Petition for Review, at 7, ¶ 4. WSDF was formed as part of NRC's opposition to the Comprehensive Plan and is the separate, legal arm for pursuing the appeal on behalf of NRC members. Moseley Declaration to WSDF's Response, at 2; Schmidt Declaration to WSDF's Response, at 2; and Chong Declaration to WSDF's Response, at 1, ¶ 2, and at 2, ¶ 5.

16. Charles Chong is also President of WSDF. Chong Declaration to WSDF's Response, at 1. WSDF's appeal of the Seattle Comprehensive Plan is being maintained on behalf of NRC members, and NRC members understand they are also members of the WSDF. Chong Declaration to WSDF's Response, at 2, ¶ 6. Chong does not indicate that this appeal was brought on behalf of the SCCF, HPAC or FLiP, nor do any documents in the record before the Board so indicate, other than the statements by Moseley and Schmidt in their declarations, described below. Chong does indicate that Moseley and Schmidt are members of both NRC and WSDF. Chong Declaration to WSDF's Response, at 3, ¶ 8.

17. Moseley and Schmidt, both members of the NRC, and each the chair of a SCCF member organization, "have always understood that the West Seattle Defense Fund has been maintaining its appeal of the Seattle Comprehensive Plan on FLiP's, HPAC's, and [our] behalf." Moseley Declaration to WSDF's Response, at 2, ¶ 5; and Schmidt Declaration to WSDF's Response, at 2, ¶ 4.

18. Nothing in the record indicates that either the NRC or the WSDF is directly or indirectly affiliated with the SCCF. Neither the NRC or WSDF is listed in the Directory (an attachment to Exhibit A to Sterbank Declaration) of the SCCF's member organizations.

II. LEGAL ISSUE BEFORE THE BOARD

Legal Issue No. 10

Pursuant to the SEPA, Chapter 43.21C RCW, does the Plan environmental impact statement adequately identify significant, adverse environmental impacts, analyze possible mitigation, and describe action alternatives?

III. POSITION OF PARTIES

Seattle's Motion to Dismiss Legal Issue No. 10 is based on two theories. First, the City argues that WSDF does not have standing to appear before the Board because it failed to exhaust the administrative remedies available to it pursuant to the Seattle Municipal Code. Specifically, Seattle claims that since WSDF did not file an appeal of the FEIS with the Seattle Hearing Examiner, WSDF is barred from now challenging the FEIS. The City contends that although SCCF did file such an appeal, SCCF is not the same organization as WSDF. Seattle's Motion to Dismiss, at 1, 3 and 5.

In response, WSDF alleges that it brought this appeal on behalf of its members and members of neighborhood organizations that were part of the SCCF (WSDF's Response, at 1) or on behalf of several of its members who were also members of SCCF (WSDF's Response, at 8). Therefore, WSDF maintains that it did exhaust its administrative remedies below. Citing *SAVE v. Bothell* and *East Gig Harbor Improvement Association v Pierce County,* WSDF claims that it "need not appeal on behalf of SCCF; it need only represent SCCF members." WSDF's Response, at 10.

Alternatively, Seattle's second theory is that even if SCCF, rather than the WSDF, had filed this appeal with the Board, SCCF failed to exhaust its administrative remedies by failing to perfect its appeal by adequately describing the errors in the FEIS, "despite repeated opportunities" to do so. Seattle's Motion to Dismiss, at 6.

In response to this argument by the City, WSDF contends that the policy rationale behind the exhaustion requirement had been met by SCCF's appeal -- SCCF had exhausted its remedies. Furthermore, WSDF asserts that when SCCF's administrative appeal was dismissed, SCCF retained the right to appeal that dismissal to the next highest appellate forum regardless whether the dismissal occurred before or after a hearing. WSDF's Response, at 11.

In rebuttal, Seattle argues that WSDF has developed an unsupported bootstrap theory of representational standing that allows it to substitute itself for SCCF. Although the City agrees that WSDF correctly cited the *SAVE* and *East Gig Harbor* cases, Seattle disagrees that any appellate court decision grants standing to an individual member of an organization simply because the organization itself has standing. Seattle also rejects WSDF's argument that if an individual member of an organization has standing, and that individual also belongs to another organization, then the different organization also obtains standing. Seattle states:

> The flaw in WSDF's theory is its assertion that because a member confers representational standing upon an organization, the organization necessarily confers standing on any one of its members. In other words, WSDF claims that standing runs both ways, from the organization to the individual as well as from the individual to the organization. However, WSDF cites no authority for this novel proposition. Indeed, the law (and cases cited by WSDF) only supports the extension of standing from the individual to the organization, not the reverse. Were this not the case an individual member of an organization could obtain standing as an individual regardless of whether he or she had suffered injury or was within the "zone of protected interests" under the law being challenged. Seattle's Reply, at 3; citations omitted.

WSDF also contends that the exhaustion doctrine does not apply because exhaustion would have been futile. WSDF maintains that because the Act's deadline for adopting comprehensive plans was looming, it would have been futile to proceed with any further administrative appeals because the City did not have sufficient time to revise both its comprehensive plan and FEIS, allow for public comment and then resolve any SEPA appeals by that deadline. WSDF's Response, at 14-15.

In reply to WSDF's futility argument, the City points out that pursuant to Seattle Municipal Code 23.76.062(c), the City Council is prohibited from taking a final action until a SEPA appeal is completed. Seattle's Reply, at 10.

IV. DISCUSSION

SEPA Standing

RCW 43.21C.075, entitled "Appeals", is the controlling provision in SEPA regarding whether WSDF has standing to challenge the City's environmental review.

Subsection (4) provides in part:

> ... a person aggrieved by an agency action has the right to judicial appeal ...[1]

This language has been interpreted to mean that:

> ... SEPA now expressly grants <u>any aggrieved person</u> the right to judicial review of compliance with SEPA's substantive and procedural requirements. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (5th ed. 1994) § 20, at 243 and § 20(b), at 248. (emphasis added; footnotes omitted). *Accord*, *State v. Grays Harbor County*, 122 Wn.2d 244, 248, 857 P.2d 1039 (1993) and *Trepanier v. Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992).

SEPA Standing Limitations

Although the language quoted above from RCW 43.21C.075(4) seemingly confers broad standing on any person, this standing is not limitless. As the Washington State Supreme Court has indicated:

> ... generally a right to appeal is "subject to such valid restrictions ... as the legislative body may place upon it." *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 29, 785 P.2d 447 (1990) quoting *Seattle Shorelines Coalition v. Justen*, 93 Wn.2d 390, 397-98, 609 P.2d 1371 (1980).[2]

In addition, court decisions themselves can limit a person's right to appeal. For instance, Divisions One and Two of the Washington Court of Appeals have imposed standing requirements on "a person aggrieved" who seeks judicial review of a SEPA determination. A party wishing to challenge a SEPA determination must meet a two-part test to establish standing. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994) citing *Trepanier v. Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524, *review denied*, 119 Wn.2d 1012 (1992). The two-part test follows:

> First, the plaintiff's supposedly endangered interest must be arguably within the zone of interests protected by SEPA. Second, the plaintiff must allege an injury

[1]"Person aggrieved" is not defined by either SEPA or the SEPA Rules, Chapter 197-11 WAC.

[2]The legislature has imposed standing restrictions in other land use provisions. *See* for example, the GMA's standing provisions at RCW 36.70A.280(2) or the Boundary Review Board Statute requirements at RCW 36.93.160(5). *See also Friends of Snoqualmie Valley v. King County Boundary Review Board*, 118 Wn.2d 488, 825 P.2d 300 (1992).

> in fact; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her specific and perceptible harm. The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be "immediate, concrete, and specific"; a conjectural or hypothetical injury will not confer standing. *Leavitt*, at 679 citing *Trepanier*, at 382-83.

Unless litigants can demonstrate a direct stake in the controversy, i.e., that they will be specifically and perceptibly harmed, they cannot invoke judicial intervention.

> Otherwise, the judicial process will become no more than a vehicle for the vindication of value interests of concerned bystanders. *Concerned Olympia Residents v. Olympia*, 33 Wn. App. 677, 684, 657 P.2d 790 (1983).

Here, WSDF's only SEPA claim is that:

> The City also failed to comply with the requirements of the State Environmental Policy Act. The Environmental Impact Statement for the Plan fails to disclose fully the impacts of the proposed Plan, to analyze proposed mitigation measures, or to address fully alternatives to it. WSDF's Petition for Review, at 6, ¶ 3.7.

WSDF's SEPA claim does not meet the two-part standing test imposed by the *Leavitt* and *Trepanier* courts. The Board has reviewed the petition for review, declarations, exhibits, and attachments filed in the case to date. Although WSDF may be within the zone of interests protected by SEPA, WSDF has not presented any evidentiary facts whatsoever to show that the FEIS and/or adoption of the comprehensive plan will cause it any specific and perceptible harm or, if threatened by the action, that the injury will be immediate, concrete and specific. Because WSDF does not have standing to raise SEPA issues, the Board cannot determine Legal Issue No. 10. Although the Board's holding may be deemed harsh by petitioners, one must keep in context the issue of standing to challenge the SEPA analysis of a land use policy document like a comprehensive plan. In a recent GMA decision, the Court of Appeals indicated:

> ... because of its broad nature, a planning policy does not regulate specific parcels, and thus, standing of a citizen is not as easily established. *Snohomish Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 54-55, __ P.2d __ (1994).

The court was dealing with a countywide planning policy (CPPs) document. The Board has previously held that, under GMA, the very nature of policy has changed. Policy statements in both the CPPs and comprehensive plans are now substantive and directive. *See Snoqualmie v. King County*, CPSGPHB Case No. 93-3-0004, at 14. The Board also held that CPPs may be either general or detailed, but that they may be only as directive as they are specific. *See Snoqualmie*, at 13. The same holds for comprehensive plan policies. To the extent that GMA policy documents, including comprehensive plans, are broad, do not apply to specific parcels of land and do not narrowly direct specific regulatory outcomes, it will be difficult to demonstrate specific injury, and therefore it

will be more difficult to establish SEPA standing. The *Snohomish Property Rights Alliance* decision underscores this more difficult standing test.

This does not mean, however, that it will never be possible to establish SEPA standing to challenge a GMA policy document. For example, to the extent that certain comprehensive plan policies apply with particularity to unique parcels of land, and narrowly direct specific regulatory outcomes, it will be less difficult to demonstrate immediate, concrete and specific injury. In such an instance, it may be possible to establish SEPA standing to challenge the GMA policy document.

Representational Standing

Even if WSDF had met the two-part standing test, the Board would nonetheless conclude that WSDF does not have standing to raise Legal Issue No. 10. The Board rejects WSDF's contention that because two members of WSDF and NRC are chairmen of two member organizations of the SCCF, WSDF has standing to bring a SEPA appeal to this Board. Historically,

> ... a nonprofit corporation, citizens' group, club or similar association could not appear in court unless it could prove standing in its own right. In 1963, however, the United States Supreme Court ruled that the NAACP had standing to represent one of its members as long as that member had standing to litigate. In 1973 this court held that under *NAACP v. Button*, an association can have standing to challenge a preliminary plat approval. In 1978 this court used a more detailed analysis to rule that a citizens' group has standing to challenge a city's rezoning action as long as one member has standing to do so. *East Gig Harbor Improvement Association v. Pierce County*, 106 Wn. 2d 707, 710, 724 P.2d 1009 (1986) citing *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978); other citations omitted.

In *East Gig Harbor Improvement Association*, the court determined that a ten year old association of 55 member families could have standing to challenge the county's approval of a preliminary plat application since one of its members individually had standing.

Given the status of representational standing caselaw alone (and, as indicated above, assuming that the petitioners had met the two-part standing test), the Board would conclude that WSDF had standing, since at least two of its members, Moseley and Schmidt, individually could have standing. However, although a party has the right to judicial review, that right may be forfeited or waived by not following the proper procedures such as exhausting administrative remedies. *South Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, 76, fn. 1, 677 P.2d 114 (1984). Accordingly, Division Three of the Washington Court of Appeals has held in a non-SEPA case that:

> A party has no standing to maintain an action in court until all administrative remedies have been exhausted. *Pasco v. Napier*, 46 Wn. App. 896, 901-02, 733

P.2d 994 (1987)[3] *reversed on other grounds* 109 Wn.2d 769, 755 P.2d 170 (1988) citing *State v. Tacoma-Pierce County Multiple Listing Service*, 95 Wn.2d 280, 622 P.2d 1190 (1980).

Although the most recent representational standing case, *East Gig Harbor*, is a SEPA case (*SAVE* was not, *per se*), it does not address SEPA's exhaustion requirement which must be reconciled.

Exhaustion of Administrative Remedies

The doctrine of exhaustion of administrative remedies is a long-standing common law requirement. Importantly, it is also statutorily imposed by SEPA and becomes a second limitation on appeals.[4] RCW 43.21C.075(4) contains the statutory exhaustion of administrative remedies provision that provides in its entirety:

> If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

The exhaustion requirement in SEPA cases is strictly enforced. It is well settled under the SEPA statute that if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted before judicial review is sought. *State v. Grays Harbor County*, at 249.

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[3]The City contends that:

> It is axiomatic that a party who has failed to exhaust a local, SEPA administrative appeals process lacks standing to obtain subsequent review of alleged noncompliance with SEPA. City's Motion to Dismiss, at 3.

The City cites two cases containing SEPA issues for this proposition, *Spokane Fire Protection District No. 9 v. Spokane County Boundary Review Board*, 97 Wn.2d 922, 929, 652 P.2d 1356 (1982) and *Bellevue 120th Street Association v. City of Bellevue*, 65 WN. App. 594, 829 P.2d 182 (1992). However, neither of these cases explicitly indicates that a party does not have standing if all administrative remedies have not been exhausted. Although the *Pasco* case does stand for the proposition raised by the City, it is not a SEPA case.

[4]A third recurring theme of SEPA appeals is the insistence on "linkage" between SEPA claims and the government action subject to SEPA pursuant to RCW 43.21C.075(1), (2)(a) and (6)(c). See also *State v. Grays Harbor*, at 250-51 and R. Settle, *The Washington State Environmental Policy Act* §20, at 244-45 (4th ed. 1993). [The identical language is contained in the 5th ed. (1994), at §20, at 244-45].

A fourth restraint on SEPA appeals also potentially exists:

> ... the principle that issues not raised in administrative proceedings may not be judicially reviewed.
>
> ... the Court's [i.e., the Washington Supreme Court in *King County v. Boundary Review Board*, 122 Wn.2d 648, 668-71, 860 P.2d 1024 (1993)] sweeping policy rationale and citation of prior case law indicated that the doctrine is not limited to state agency proceedings subject to the APA but would apply to local administrative review, as well.... R. Settle, *The Washington State Environmental Policy Act* §20(c)(i), at 251-252 (5th ed. 1994).

The Board has previously reviewed this provision and held that the use of the word "judicial" in the phrases "judicial appeal" and "judicial review" in RCW 43.21C.075(4), refers to both review by courts and by this quasi-judicial growth management hearings board. *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, Order Granting Dispositive Motions, at 6. The Board has also previously noted that obtaining standing through the GMA's standing provisions (i.e., RCW 36.70A.280(2)) does not eliminate the SEPA statute's exhaustion requirements for bringing SEPA challenges. *Association of Rural Residents*, Order on Dispositive Motions, at 12, fn. 10. The Board now so holds.

In *Citizens for Clean Air v. Spokane*, a SEPA case, the Washington State Supreme Court applied the policy rationale for the common law exhaustion doctrine to SEPA's exhaustion of administrative remedies statute (i.e., RCW 43.21C.075(4)).[5] Exhaustion:

> (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 30,785 P.2d 447 (1990) citing *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 78, 768 P.2d 462 (1989).

These policies are not to be taken lightly, as there is a strong bias toward requiring exhaustion. *Estate of Friedman*, at 78. The quotation above:

> ... is not simply repetition of a jingoistic formula. Each of these policy underpinnings to the exhaustion doctrine is significant in and of itself, and, together, they mandate observance of the exhaustion requirement absent compelling ground for excuse. *Estate of Friedman*, at 78.

[5]The *Citizens for Clean Air* court cited two non-SEPA related land use cases involving claims for inverse condemnation, *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 78, 768 P.2d 462 (1989) and *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985). *Friedman* and *Orion*, in turn, cited to a third non-SEPA land use case -- *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 74, 677 P.2d 114 (1984) for the policy rationale for the common law exhaustion doctrine established by the courts.

The principle underlying the policy rationale for the doctrine is:

> ... founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges. *Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984).

A four-part test for determining whether the exhaustion requirement bars a SEPA claim is:

> (1) whether administrative remedies were exhausted; (2) whether an adequate remedy was available; (3) whether adequate notice of the appeals procedure was given; and (4) whether exhaustion would have been futile. *Citizens for Clean Air v. Spokane*, 114 Wn. 2d 20, 26, 785 P.2d 447 (1990).

In this case, the Board must reconcile SEPA's broad conferral of standing and the representational standing holdings of the *SAVE* and *East Gig Harbor* cases with the statutory exhaustion requirement imposed by RCW 43.21C.075(4) and its accompanying case law. The Board concludes that SEPA's specific exhaustion requirement controls over the more general representational standing caselaw. Although it would have been impossible for WSDF to raise a SEPA challenge below since it was not created until apparently sometime in the late summer or early fall of 1994 (*see* Finding of Fact No. 15), its parent organization, NRC, clearly could have done so. NRC was established sometime during the period of December, 1993 and January, 1994. Finding of Fact No. 1. The FEIS was not issued until March 3, 1994. Finding of Fact No. 4. Therefore, NRC itself could have appealed the adequacy of the FEIS. Instead, only the SCCF filed such an appeal. Finding of Fact No. 5. Neither NRC nor WSDF is a member of SCCF. Finding of Fact No. 18.

RCW 43.21C.075(4) requires an aggrieved person to use available agency appeal procedures before seeking judicial review. SCCF was the only aggrieved party below that exercised its right of appeal and thus had standing to appeal to this Board. Yet NRC, or any of SCCF's member organizations (including HPAC and FLiP), or countless other organizations and individuals could have appealed the FEIS below and subsequently brought this SEPA appeal to the Board. However, none of these potential appellants below is now before the Board. Accordingly, NRC, the WSDF's parent organization, did not exhaust its administrative remedies below.

Exceptions to the Exhaustion Requirement

Next, the Board examines WSDF's exhaustion status. The requirement for exhaustion of administrative remedies is not absolute. *Orion*, at 457. In the context of the exhaustion doctrine, as opposed to the SEPA statute exhaustion requirement, Washington courts have recognized several exceptions.

> For example, if resort to the administrative procedures would be futile, exhaustion is not required. Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived. Also, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused. *Hollywood Hills Citizens*, at 74; citations omitted.

The futility exception is premised upon the rationale that courts will not require vain and useless acts. *Orion*, at 458. It is the only exception to the common law doctrine of exhaustion of administrative remedies that has been applied in a SEPA context. In *Citizens for Clean Air*, the court considered the futility exception but concluded that it did not outweigh "the policies underlying exhaustion [which] impose a substantial burden on a litigant attempting to show futility." *Citizens for Clean Air*, at 30. The court pointed out that the factual circumstances of a case rarely justify a finding of futility and that courts cannot infer futility from a policy choice alone made by the lead agency. *Citizens for Clean Air*, at 31-32; *see also Estate of Friedman*, at 80. However, futility is one of the elements of the four-part test (*see above*) the court announced for determining whether exhaustion prevented a SEPA appeal.

Although the Board is sympathetic to the unique circumstances a potential SEPA challenger faced due to the City Council's electing to prepare an alternative to the Mayor's Proposed Comprehensive Plan, it nonetheless rejects the argument that it would have been futile to appeal the FEIS because the deadline for adopting comprehensive plans was rapidly approaching and the City did not have enough time to revise both its comprehensive plan and the FEIS. WSDF's Response, at 6. Although RCW 36.70A.040 does require Central Puget Sound cities and counties to adopt comprehensive plans by July 1, 1994, numerous jurisdictions have not met that deadline. The fact that the deadline existed is no excuse for an aggrieved party not to participate in the administrative appeals process below. Indeed, both the Act (*see* RCW 36.70A.345) and the Board (*see* WAC 242-02-220(5)) recognize the possibility of a jurisdictions failing to act in a timely manner. The facts in this case do not justify invoking the futility exception.

Furthermore, the Board rejects any potential argument that WSDF could make that exhaustion would be impossible since it had no opportunity to exercise the City's administrative procedures because the organization did not even exist until after the FEIS was issued. If the Board were to allow WSDF's appeal, it would implicitly authorize any would-be organization intent on appealing an environmental determination to wait until after the administrative appeals procedure below has run before being formally established and filing an appeal. Condoning such delaying behavior would defeat all five of the strong policy objectives for the exhaustion requirement.

> It is not unfair to expect citizens groups to use available administrative procedures. Fairness to the agencies requires that would-be litigants try to clarify ambiguity before going to court. *Citizens for Clean Air*, at 28.

Finally, although during oral argument WSDF referred to the difficulty in raising money to cover the costs of filing appeals as one of the reasons justifying NRC's inaction in the administrative appeals process below, as Division One of the Court of Appeals has indicated, a party:

> ... should not be excused from completing the administrative process because compliance would have been costly. Justice Stevens, concurring in *Williamson Cy Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 204, 87 L.Ed. 2d 126, 105 S. Ct. 3108 (1985), stated that such expense is the 'inevitable cost of doing business in a highly regulated society.' *Bellevue 120th Assocs. v. Bellevue*, at 602.

V. CONCLUSIONS

The Board will not determine Legal Issue No. 10 because WSDF does not have SEPA standing. WSDF has not met the two-part test for SEPA standing because it has not shown any injury in fact. Furthermore, WSDF's parent organization, the NRC, failed to exhaust its administrative remedies below. WSDF could not exhaust the administrative remedies below prior to bringing this SEPA issue before the Board because it did not exist at the appropriate time. The strong policy rationale for the SEPA statute's exhaustion requirement mandates that, for an organization to appear before the Board with a SEPA challenge, it must have first appeared below if any local administrative procedures existed for making SEPA challenges.

VI. ORDER

Having reviewed the above-referenced documents, having considered the parties' arguments, and having deliberated on the matter, it is ORDERED that:

The City of Seattle's Motion to Dismiss SEPA Claim is **granted**. *Legal Issue No. 10* is **dismissed with prejudice**.

So ordered this 30th day of December, 1994.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley, Presiding Officer

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Joseph W. Tovar, AICP

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Chris Smith Towne